

DEC 14 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO VIDEZ-RUIZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-71535

Agency No. A77-173-693

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted December 5, 2005^{**}

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

Francisco Videz-Ruiz, a native and citizen of Guatemala, petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen removal proceedings conducted in absentia. We have jurisdiction under 8

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen, *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002), and review de novo claims of ineffective assistance of counsel, *Dearinger v. Reno*, 232 F.3d 1042, 1044-45 (9th Cir. 2000). We grant the petition for review.

The BIA abused its discretion in denying Videz’s motion to reopen alleging ineffective assistance of counsel because Videz substantially complied with the requirements contained in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), and the legitimacy of his claim was “plain on the face of the administrative record.” *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824-25 (9th Cir. 2003). Videz was prejudiced by his counsel’s untimely filing because his contentions on appeal might have been successful. *See id.*; *see also Dearinger*, 232 F.3d at 1045 (failure to file a timely appeal creates a presumption of prejudice). Accordingly, we remand to the BIA to grant Videz’s motion to reopen.

PETITION FOR REVIEW GRANTED; REMANDED.